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In The

Supreme Court of the United States

October Term, 1995

GARETH REES AND TERREL JOHNSON,
Petitioners,

vs.

STATE OF TEXAS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE THIRD JUDICIAL DISTRICT

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May 28, 1996

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QUESTIONS PRESENTED

1. Does the First Amendment permit an obscenity prosecution to be based solely on a brief excerpt from a two hour educational cable television program -- unlike obscenity prosecutions of printed publications, in which all rationally related material must be considered as a whole under the Court's unanimous decision of *Kois v. Wisconsin*, 408 U.S. 229 (1972)?

2. Is sexually explicit material that has serious *educational* value, such as a brief depiction of safer sex practices contained within a two-hour cable television program about AIDS, protected by the First Amendment and this Court's rulings in *Miller v. California* and *Roth v. United States*?

PARTIES

The parties in the proceedings before the Texas Court of Appeals for the Third Judicial District were:

State of Texas, *Appellee*.

Gareth Rees, *Appellant* (No. 03-94-00290-CR).

Terrel Johnson, *Appellant* (No. 03-94-00291-CR).

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINION OF THE COURT OF APPEALS AND RULINGS OF THE TRIAL COURT . . 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED SOLELY ON A SHORT SNIPPET EXTRACTED FROM A LARGER WHOLE, EVEN WHEN THE MEDIUM IS FILM, RATHER THAN PRINT 8

II. THIS COURT SHOULD ADDRESS THE IMPORTANT, BUT UNSETTLED, QUESTION OF WHETHER DIFFERENT MEDIA ARE SUBJECT TO DIFFERENT APPLICATIONS OF THE "VIEWED AS A WHOLE" STANDARD 10

III. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS OF

INTENTIONALLY EROTICIZED SAFER SEX EDUCATIONAL MATERIALS 13

IV. THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED ON MATERIAL THAT HAS SERIOUS EDUCATIONAL VALUE 15

CONCLUSION 17

APPENDIX

Opinion of the Texas Court of Appeals for the Third Judicial District, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-1

Notice from Texas Court of Appeals for the Third Judicial District overruling Consolidated Motion for Rehearing and Suggestion for Reconsideration En Banc, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-17

Notice from Texas Court of Appeals for the Third Judicial District denying Petition for Discretionary Review, *Rees v. State*, No. 03-94-00290-CR, and *Johnson v. State*, No. 03-94-00291-CR A-18

Charge of the Court, *State v. Rees* A-19

Charge of the Court, *State v. Johnson* A-27

Defendants' Proposed Jury Instruction No. 3 . . . . . A-35

Jury Note A-36

TABLE OF AUTHORITIES

CASES

American Civil Liberties Union v. Reno,
No. C.A. 96-963 (E.D. Pa. filed Feb. 8, 1996) 12

Bowers v. Hardwick,
478 U.S. 1039 (1986) 10

Jacobelis v. Ohio,
378 U.S. 184 (1964) 7

Kois v. Wisconsin,
408 U.S. 229 (1972) 3, 9, 12

Luke Records, Inc. v. Navarro,
960 F.2d 134 (11th Cir. 1992) 14

Memoirs v. Massachusetts,
383 U.S. 413, 419 (1966) 16

Miller v. California,
413 U.S. 15, 93 S. Ct. 2607,
37 L. Ed.2d 419 (1973) 8, 13, 15, 16

Penthouse v. McAuliffe,
610 F.2d 1353 (5th Cir.),
cert. dism'd, 447 U.S. 931 (1980) 10-12

Pope v. Illinois,
481 U.S. 497, 500-01 (1987) 13

Rees v. Texas,
909 S.W.2d 264 (Tex. App.-- Austin 1995,
pet. ref'd) 4

Regina v. Hicklin,
L.R. 3 Q.B. 360 (1868) 8

Roth v. United States,
354 U.S. 476, 77 S. Ct. 1304,
1 L. Ed.2d 1498 (1957) 8

Texas v. Morales,
826 S.W.2d 201 (Tex. App.-- Austin 1992),
rev'd, 869 S.W.2d 941 (Tex. 1994) 10

United States v. One Book Called "Ulysses,"
5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*,
72 F.2d 705 (2d Cir. 1934) 8

CONSTITUTIONS AND STATUTES:

U.S. Const. amend. I 2

U.S. Const. amend. XIV, § 2 2

28 U.S.C. § 1257(a) 2

Telecommunications Act of 1996,
Pub. L. No. 104-104 § 561(b),
110 Stat. 56, 142 (1996) 12

Texas Penal Code § 43.24 3

Texas Penal Code § 43.23(c) 3

Wisc. Stat. § 944.21(2)(c)(3) 16

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Petitioners, Gareth Rees and Terrel Johnson respectfully pray that a writ of certiorari issue to review the judgments and opinion of the Texas Court of Appeals for the Third Judicial District entered in this proceeding on October 18, 1995, and rendered final by the Texas Court of Criminal Appeals on February 28, 1996.

OPINION OF THE COURT OF APPEALS AND RULINGS OF THE TRIAL COURT

The opinion of the Texas Court of Appeals for the Third Judicial District is reported at 990 S.W.2d 264, and is set out at pages A-1 through A-16 of the Appendix ("App.").

JURISDICTION

The decision of the Texas Court of Appeals was entered October 18, 1995. Petitioners' Motion for Rehearing and Suggestion for Reconsideration En Banc was overruled November 15, 1995. Petitioners' Joint Petition for Discretionary Review was denied, one justice dissenting, on February 28, 1996. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the Constitution of the United States, which read in relevant part:

> Congress shall make no law ... abridging the freedom of speech, or of the press ... .

U.S. Const. amend. I.

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ... .

U.S. Const. amend. XIV, § 2.

STATEMENT OF THE CASE

Introduction

Petitioners Gareth Rees and Terrel Johnson have been branded as pornographers for their attempt to teach and encourage people to practice safer sex. Their convictions were obtained and affirmed under a long-discredited theory that obscenity prosecutions may be based *solely* on a small snippet from a larger, related whole. The prosecutor for the State of Texas candidly admitted this during closing argument when he said "The [two-hour] show itself is not on trial. *The three-minute clip is on trial.*"

This Court should grant certiorari not simply to reverse the Court of Appeals' failure to follow this Court's unanimous ruling in *Kois v. Wisconsin*, 408 U.S. 229 (1972), that rationally related material must be considered as a whole. Certiorari should be granted to allow this Court to address the uncertain legal landscape that led to Petitioners' convictions -- and to answer the important questions of when, if ever, the *medium* of expression permits ignoring or modifying the "viewed as a whole" requirement, and whether the First Amendment protects valuable, but purposefully erotic, safe-sex education.

Proceedings in the Texas Courts

Mr. Rees and Ms. Johnson were indicted on single counts of promoting obscenity and displaying harmful material to a minor. See Texas Penal Code §§ 43.23(c), 43.24. The jury, after a five-day trial, acquitted Petitioners of "harmful display," but convicted them of "promoting obscenity." Petitioners were sentenced to 180 days in jail, suspended in lieu of one year's probation.

On appeal, the Texas Court of Appeals affirmed the obscenity convictions in a published opinion issued October

18, 1995. *See Rees v. Texas*, 909 S.W.2d 264 (Tex. App.--Austin 1995, pet. ref'd). The Court of Appeals overruled Petitioners' Motion for Rehearing and Suggestion for Reconsideration En Banc and on February 28, 1996, the Texas Court of Criminal Appeals, Judge Clinton dissenting, denied Petitioners' Joint Petition for Discretionary Review. App. A-17, A-18.[1]

Statement of Facts

The "Infosex" series. From October 1992 through August 1993, Gareth Rees hosted a cable-access call-in program called *Infosex*. The format was simple: Mr. Rees in front of the camera answering viewers' telephone calls. Mr. Rees hosted the program about every four weeks. Each *Infosex* program had a different topic related to human sexuality, with an emphasis on responsible behavior and the dangers of sexually-transmitted diseases, particularly HIV.[2]

Mr. Rees' first *Infosex* program concerned sexual orientation and respect. His second show discussed HIV and how at-risk people sometimes resist being tested. The third program concerned people in HIV denial -- those who refuse to accept their HIV status and keep having unprotected sex. The fourth *Infosex* program provided information about Austin-area public assistance and HIV testing. The fifth program discussed couples and sexual identity, and the sixth concerned relationships between HIV positive and HIV negative persons. The seventh in the series stressed the

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[1]Upon Petitioners' motion, the Court of Appeals stayed issuance of its mandate until June 7, 1996.

[2]Mr. Rees is an HIV positive young gay man who lost his first lover to AIDS. Petitioner Terrel Johnson, who produced the *Infosex* program at issue, also suffers from a debilitating diseases, diabetes.

importance of communication about HIV, AIDS and other sexually transmitted diseases.

The eighth *Infosex* program, the one at issue here, had an announced theme of sexual fantasies and role-playing as a way to enhance a person's sex life in a safe way. The program aired from 12:00 a.m. to 2:00 a.m. on August 23, 1993, and was preceded by a notice advising that the program was for mature audiences only, that parental discretion was advised, and that the program would include sexual discussion, profanity and male nudity.

During the two-hour program, Mr. Rees fielded calls from a number of listeners. Most of the callers sought information about safe sex and HIV; the "fantasy" theme was not the dominant topic. While some callers were abusive, most had honest questions or comments about the dangers of sexually transmitted diseases and ways to reduce the risk of contracting AIDS. For example, Mr. Rees discussed the spread of AIDS with a caller who disapproved of a homosexual lifestyle, but who was still worried about the disease. He talked with a man whose friend feared AIDS so much he committed suicide.

Mr. Rees fielded a long call from a man who claimed to be HIV positive and who asked about the transmission of the virus and safe-sex techniques. Mr. Rees said that HIV can be transmitted through oral sex, and that "You need to make sure you wear a condom." He verbally described a "dental dam," how to make one from a condom, and that it should be used when performing oral sex on a woman, or "rimming" a man (anilingus). Responding to the caller's claim that he remained interested in sex despite being HIV positive, Mr. Rees said "I don't want you to feel you have to give up your sex life just because you're HIV positive. You'll just have to look at sex in a different way."

Mr. Rees explained the purpose of a condom's reservoir tip, and he discussed other sexually transmitted diseases and transmission rates among different population groups. He condemned the dangerous "tea room" practice of some gay men. When a caller raised the "fantasy" theme and body piercing, Mr. Rees used it as an opening to discuss the danger of infection.

Near the end of the program, Mr. Rees stated that he was going to play a videotape clip produced by the Gay Men's Health Crisis, a large New York AIDS education foundation. The video, called "Midnight Snack," briefly showed two men engaging in non-penetrative acts of safer sex that had been discussed during the program. It showed the use of the protective barriers (condoms and dental dams) that had also been discussed earlier. Importantly, it showed these practices in a way that was meant to make them attractive and stimulating to gay men, in contrast to the largely fruitless scare tactics used in old Army VD films. The short video ended with the printed words "SAFER SEX."

After the video, Mr. Rees pointed out the video's safer-sex lessons, fielded a few more related calls, and ended the show.

The Trial. True to its erroneous legal theory, the government put three minutes of the two-hour program "on trial." No government witness had even *seen* the whole *Infosex* program -- each had viewed only the short Gay Men's Health Crisis video clip. None could put the video in context with the rest of Mr. Rees' program.

Petitioners called four experts, all of whom had viewed the entire program. Each testified that the program and the short video clip had serious value in the fight against transmission of HIV and AIDS.

Over Petitioners' objections, the jury was instructed to consider *only* certain erotic acts depicted in the three-minute videotape -- *not* the two-hour *Infosex* program -- and under that instruction, Petitioners were convicted. App. A-23, A-31. Petitioners sought an instruction that would preclude conviction if the jury found serious *educational* value in the material, but that request was also refused. App. A-35.

The Court of Appeals' Decision. Both the State and the Court of Appeals acknowledged that Petitioners' convictions stood or fell on whether the three-minute video clip could be considered apart from the two-hour program. The jury instructions, the evidence, and the court's constitutional duty of independent review under *Jacobelis v. Ohio*, 378 U.S. 184, 190, (1964), all turned on this issue.

The facts, even as stated by the court (with significant omissions), amply showed a strong relationship between the two-hour program and the short video clip. App. A-4-5. However, the Court concluded that because the *Infosex* program was "a live, unrehearsed, loosely structured call-in program" and the video was "produced by parties other than appellants long before the program *Infosex* was produced," the short video was a "separate unit of perception" that could be charged separately. App. A-6-9.[3] Armed with that conclusion, the court then rejected each trial error that turned on that question, and made an independent

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[3]The opinion also discusses another short video clip, this one of Mr. Rees, shown at the beginning of the program. Although that video was not the subject of the indictment, the Court ruled that this clip, too, could have been charged as a separate "unit of perception." App. A-9. (The court's opinion also omits the significant fact that the video only shows Mr. Rees in silhouette behind frosted glass.)

determination that the three-minute video was obscene, without referring to the rest of the program. App. A-12.

The court also affirmed the refusal to instruct the jury that serious *educational* value would preclude conviction. Perhaps feeling free to do so by its "unit of perception" test, the court ignored the issues of AIDS and safer sex permeating the case, and simply stated that "[t]he overall educational value, if any, of exposure to pornography does not create scientific value." App. A-12.

REASONS FOR GRANTING THE WRIT

I.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED SOLELY ON A SHORT SNIPPET EXTRACTED FROM A LARGER WHOLE, EVEN WHEN THE MEDIUM IS FILM, RATHER THAN PRINT

This Court has long abandoned as contrary to the First Amendment the idea that speech can be declared "obscene" and punished based on isolated passages or excerpts. *Roth v. United States*, 354 U.S. 476, 489 (1957). That moribund principle -- credited to the British ruling of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868) -- was used in attempts to suppress such works as James Joyce's *Ulysses*. *See United States v. One Book Called "Ulysses,"* 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

Before judging speech to be obscene, this Court requires it to be "taken as a whole" -- both as to its alleged "appeal to the prurient interest," and its alleged lack of "serious literary, artistic, political or scientific value." *Miller*, 413 U.S. at 24. While repeatedly reaffirming this

principle's central place in the constitutional limitations on obscenity prosecutions, Petitioners find only one case where this Court specifically considered the "taken as a whole" requirement, the unanimous decision of *Kois v. Wisconsin*, 408 U.S. 229 (1972)(per curiam).

In *Kois*, this Court reviewed an obscenity conviction gained against the publisher of an alternative newspaper. The newspaper had published two erotic photographs as illustrations to an article describing the seizure of other, allegedly obscene photographs. *Id.* at 229-30. The conviction had been obtained based on the photographs alone. This Court reversed, holding that whether or not "the State could constitutionally prohibit the dissemination of the pictures by themselves," they could not convict when the pictures were published in a newspaper and "were rationally related to an article that itself was clearly entitled to the protection of the Fourteenth Amendment." *Id.*

It seems indisputable that the short video in this case was "rationally related" to the two-hour program, and if *Kois* remains the law, Petitioners' convictions should be reversed. While the entire *Infosex* program was admitted into evidence, the jury was specifically instructed to consider only the depiction of certain erotic acts in the three-minute video shown near the end of the program. App. A-23, A-31.

The medium should not matter. *Kois* involved photographs and a newspaper article, while this case involves a video clip shown during an access-cable program. This distinction does not merit a different result. The photographs in *Kois* were surely taken at a different time and place than the articles they illustrated, and thus were distinct "units of perception" under the Texas court's reasoning. Like Mr. Rees' program, however, the article and photos were published together and were related, and thus "taken as a whole."

This Court should reject the "unit of perception" theory, and reaffirm the principle that -- whatever the medium -- prosecutors cannot censor and edit portions of citizens' expression they find objectionable without addressing the context. Isolating the short video allowed the State of Texas to successfully pretend that it was just prosecuting "a porno film," as the prosecutor told the jury -- not a serious, albeit controversial, method of AIDS education.

II.

THIS COURT SHOULD ADDRESS THE IMPORTANT, BUT UNSETTLED, QUESTION OF WHETHER DIFFERENT MEDIA ARE SUBJECT TO DIFFERENT APPLICATIONS OF THE "VIEWED AS A WHOLE" STANDARD

Petitioners' convictions may not have resulted from an isolated error. The Austin Court of Appeals is highly respected, and has not dodged controversial questions. This same court invalidated the Texas sodomy statute under the state constitution, when it could have easily followed this Court's decision in *Bowers v. Hardwick*, 478 U.S. 1039 (1986). *See Texas v. Morales*, 826 S.W.2d 201 (Tex. App.-- Austin 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994).

Rather, the result may be attributable to uncertainty and lack of definition in a critical part of the constitutional obscenity definition -- what exactly *is* the "material" that should be "taken as a whole?" The Texas Court found this to be an "uncertain and difficult" question. App. A-6.

The Court of Appeals for the Fifth Circuit also stumbled through this issue in *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir.), *cert. dism'd*, 447 U.S. 931 (1980). The prosecutor in *Penthouse* argued that the erotic content of

adult magazines should be separately viewed from their editorial content. The Fifth Circuit, not without difficulty, concluded that this Court's precedents did not justify treating magazines differently, and that a general thematic relationship in the magazines at issue -- "entertainment for men" -- justified taking each magazines "as a whole."

Two panel members wrote separately. Judge Clark, in a theme picked up by the Texas Court of Appeals in this case, wrote "to observe that this rule of law in its present state of development creates needless uncertainty for everyone involved." *Penthouse*, 610 F.2d at 1373.

> Should it weigh the good against the bad, *i. e.*, does one brilliant article on the arts outweigh explicit pictures of a couple copulating? ... When the materials are totally independent of every other portion of the publication except through a claimed appeal to some interest of the magazine's expected audience, I submit that segment ought to be separately appraised. ... Until the court permits separate appraisal of each discrete segment of the hodge-podge, publishers, community, policeman and judge will have to continue to wonder what the drum says.

Id., 610 at 1374.[4] Petitioners of course contend that the video and two-hour program are *not* independent, but Judge Clark's concern, and the Texas Court of Appeals' ruling fifteen years later, show that more clarity is still needed.

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[4]Judge Kravitch's separate opinion featured charts and indexes measuring, page-by-page, the amount of erotic and non-erotic content, and judging the varying value of the non-erotic content. *Id.* 610 F.2d at 1374-78 (Kravitch, J., concurring in part and dissenting in part).

The uncertainty has only been exacerbated by developing technology. *Kois* and *Penthouse* dealt with familiar print publications, yet still the Fifth Circuit struggled with the question of *collective* expression -- where is the line drawn between genuinely related and unrelated material which just happens to be bound together?

Electronic media present this issue in spades. Films, videos, broadcasts, and now computer communications in cyberspace, all contain collective assemblages of speech, variously combined and related. This Court should grant review to prevent further exploitation of the legal uncertainty with theories like the "unit of perception" concept adopted in this case.

Technological innovations will inevitably bring this Court back to the hard work of defining what speech may be regulated as "obscene" or "indecent." For example, the Communications Decency Act of 1996 is currently under judicial review, with a provision for direct appeal to this Court. *See American Civil Liberties Union v. Reno*, No. C.A. 96-963 (E.D. Pa. filed Feb. 8, 1996); Telecommunications Act of 1996, Pub. L. No. 104-104 § 561(b), 110 Stat. 56, 142 (1996). This Court will soon be facing the question of how the First Amendment's requirement that speech be "taken as a whole" relates not just to newspapers and cable-access programs, but to the multi-layered content of World Wide Web "home pages" on the Internet, which can combine diverse text, images, video and sound. This case presents an appropriate place to begin the work.

III.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS OF INTENTIONALLY EROTICIZED SAFER SEX EDUCATIONAL MATERIALS

The *Miller v. California* three-part test is *conjunctive*: obscene speech must contain patently offensive depictions of sexual or excretory acts, appeal to the prurient interest, *and* it must lack serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24. Because this standard is conjunctive, there is a category of speech which community standards might deem "prurient" and "offensive," *but which is constitutionally protected because it has serious value*.

Serious social value is not measured by "community standards," but rather by an objective test in light of the evidence and material taken as a whole:

> Just as the ideas a work represents need not obtain majority approval to merit protection, neither, insofar as the First Amendment is concerned, does the value of the work vary from community to community based on the degree of acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.

Pope v. Illinois, 481 U.S. 497, 500-01 (1987).

If there is *any* material that a community might find prurient and offensive, but which has serious social value, this case concerns it. Far less noble intentions than saving lives from AIDS infection have merited careful judicial

review of unpopular speech -- and warranted reversal when the material arguably has some serious value. *See, e.g., Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (reversing obscenity conviction for lack of proof that 2 Live Crew album "As Nasty They Wanna Be" lacked serious artistic value).

The lengthy record in this case demonstrates the serious value of the *Infosex* program, including the GMHC video. Mr. Rees frankly discussed and realistically showed actual safer sex techniques, and the video showed safer sex as appealing to an audience specifically at high risk of contracting HIV.

Among the experts testifying for Petitioners was Sherry Bell, a University of Texas student health educator who explained the important, but admittedly controversial, technique of eroticizing safer sex. Because safe sex is commonly thought to be unappealing and unsatisfying, it is increasingly honored in the breach, particularly by a young generation of fatalistic gay men.

Saul Gonzalez, the founder of an AIDS outreach project which targets the Mexican-American community, explained the serious need for plain, understandable educational materials for persons of color and lower income. Many of his project's clients lack the advantages of Ms. Bell's college students, and visual material is particularly valuable to those who cannot read English, or who do not read well. He explained the importance of visual reinforcement through various media.

Tom Doyal, an Austin attorney and pioneer in the Texas battle against AIDS, explained that Mr. Rees' program reached a

> population with some teaching about how to stay alive and still conduct an erotic, intimate life. It was

> about the use of fantasy ... in lieu of going out and doing these things particularly and placing themselves at risk. It was about the use of condoms. It was about saving people's lives.

The *Infosex* program was not like the Army VD films of days past. Mr. Rees chose a different way of discussing sexuality and the dangers of sexually transmitted diseases. The choice to use the GMHC video clip on a cable-access program may have shown naivete or poor judgment -- and it may have even violated the community standards of Texas -- but because the program and video had serious value, when properly considered as a whole, it was not obscene.

IV.

THE FIRST AMENDMENT PRECLUDES OBSCENITY PROSECUTIONS BASED ON MATERIAL THAT HAS SERIOUS *EDUCATIONAL* VALUE

The Texas Court of Appeals treated the four *Miller* "serious value" adjectives -- "literary, artistic, political and scientific" -- as talismanic and exclusive. It affirmed the refusal to instruct the jury that the First Amendment protects serious *educational* value, not strictly *scientific* speech.

The difference here between "education" and "science" was not theoretical: Petitioners vigorously defended the *Infosex* program as having serious educational value, including the Gay Men's Health Crisis video, while the prosecutor attacked Mr. Rees' credentials and the video because it purportedly did not teach the very safest sexual practices -- that is, it lacked scientific method. The court's resolution of this question -- "exposure to pornography does not create scientific value" -- entirely begged the question.

The *Infosex* program dealt with AIDS in a way that was accessible to an at-risk population, and the short video

presented eroticized safer sex in a manner that would make it seem enjoyable, not clinical. The *Infosex* program did not claim to be "science" -- but the evidence supported a conclusion (and a jury instruction) that it *was* a serious educational program warranting constitutional protection.

AIDS is *still* incurable; education remains the *only* way to prevent continued transmission. In this case, the jury could have agreed that the material had serious educational value, but convicted because it concluded that the value was not "scientific." This should not be the law.[5]

After this case, obscenity convictions can now be obtained in Texas based on speech that incontestably has serious *educational* value, if the jury decides that value is not quite "scientific." This Court never intended -- or else it should take this case to clarify that it did -- that the "serious literary, artistic, political and scientific" language from *Miller* was an exclusive list of the only social values that warrant First Amendment protection. While *Miller* may have heightened the standard from "utterly without redeeming social value" to "lacking serious value," it did not change the *type* of social values warranting First Amendment protection. *See Miller*, 413 U.S. at 21-24; *Memoirs v. Massachusetts*, 383 U.S. 413, 419 (1966).

This Court should grant review to determine whether, when it is supported by the evidence, as here, the First

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[5]At least one state, Wisconsin, has felt compelled to specifically add lack of "educational" value to its obscenity statute to avoid this problem. *See* Wisc. Stat. § 944.21(2)(c)(3) (material must lack "serious literary, artistic, political, educational or scientific value, if taken as a whole").

Amendment protects speech which, taken as a whole, contains serious educational value.[6]

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the Texas Court of Appeals for the Third Judicial District, and reverse the Petitioners' convictions.

Respectfully submitted,

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[6]The Court of Appeals ruled on the merits of this issue, thereby preserving it for review. App. A-14-15. Petitioners note, however, that the court's *dictum* regarding waiver applies only to this issue, not the question of what material is properly "taken as a whole." Further, that *dictum* is plainly erroneous, because it depends upon the court's mistaken "unit of perception" theory, and because it entirely fails to acknowledge that Petitioners preserved the error by submitting a proposed jury instruction, *see* App. A-35, which is all Texas law requires. Tex. Code Crim. Pro. art. 36.15.

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TEXAS COURT OF APPEALS
THIRD DISTRICT, AT AUSTIN

No. 03-94-00290-CR

Gareth Rees, Appellant

v.

The State of Texas, Appellee

No. 03-94-00291-CR

Terrel Denise Johnson, Appellant

v.

The State of Texas, Appellee

FROM THE COUNTY COURT AT LAW NO. 7 OF TRAVIS COUNTY
NOS. 400,780 & 400,781, HONORABLE BRENDA KENNEDY,
JUDGE PRESIDING

Before POWERS, ABOUSSIE and DALLY.[1]

CARL E.F. DALLY, Justice (Retired).

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[1]Before Carl E.F. Dally, Judge (retired), Court of Criminal Appeals, sitting by assignment. See Tex. Gov't Code Ann. § 74.003(b) (West 1988).

A jury convicted appellants Gareth Rees and Terrel Denise Johnson of the offense of promotion of obscenity. Tex. Penal Code Ann. § 43.23(c) (West 1994).[2] The trial court assessed each appellant's punishment at confinement in the county jail for one hundred eighty days and a fine of $2,000.00, probated for one year. The jury acquitted appellants of charges of harmful display of obscene material to minors. The charges against appellants were joined for trial before the same jury, and on appeal, appellants filed a consolidated brief. Three points of error challenge the sufficiency of the evidence, and three points of error complain of the court's jury charge. We will affirm the judgments of the trial court.

Infosex, a live call-in program produced by appellant Johnson and hosted by appellant Rees was telecast for several months on an Austin Community Television Cable access channel. During the *Infosex* program aired on August 23, 1993, between 12:00 a.m. and 2:00 a.m., appellants exhibited a film called *Midnight Snack*. The showing of *Midnight Snack* resulted in charges against and convictions of appellants. The indictments in pertinent part allege appellants

> knowing the content and character of certain material was obscene, to wit: One (1) video tape depicting a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man licking with his tongue the anus of another and two men masturbating each other, did then and there promote said material by transmitting, exhibiting, disseminating and present said video tape during a broadcast on an Austin Cablevision channel.

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[2]This offense took place before September 1, 1994, and is governed by the law in effect at the time the offense was committed. Penal Code, 73rd Leg., R.S., ch. 900, § 1.18, 1993 Tex. Gen. Laws 3586, 3705. Because the code amendments effective September 1, 1994, have no substantive effect on this offense, the current code is cited for the sake of convenience.

The indictments charging appellants with promoting obscene material describe the acts depicted in the film *Midnight Snack*. Jury instructions tracked the indictments authorizing appellants' conviction for promoting the acts portrayed in the film *Midnight Snack*. Appellants assert that the film *Midnight Snack* was an integral part of the *Infosex* program and that because the State did not even attempt to prove that the entire *Infosex* program was obscene the evidence does not support appellants' convictions. On the other hand, throughout the prosecution and now on appeal, the State insists that it need not prove that the entire *Infosex* program was obscene but need prove only that the film *Midnight Snack* was obscene. Therefore, we must decide whether the film *Midnight Snack* may alone and separately be considered in determining if appellants promoted obscene material. We will first address appellants' fourth point of error in which they assert the trial court erred in failing to instruct the jury to consider the *Infosex* program as a whole.

Although they were acquitted, appellants had been charged with and were on trial for the harmful display of obscene matter to minors. To prove these charges, the State offered the testimony of a minor and expert testimony. Also, in an apparent attempt to show circumstantially that some of the callers and viewers were minors, the State offered in evidence not only the film *Midnight Snack* but the entire tape of the *Infosex* program.

The *Infosex* program starts with an introductory film clip of a "shower scene in which the sole actor is appellant Rees. Rees is nude with his back to the camera, legs spread and his scrotum visible. Rees caresses his body, saying he loves his body, and slowly turn until he presents a fully nude frontal view. He fondles his testicles and penis and expresses a belief that he is about to ejaculate. Rees testified that he showed the shower scene as an introduction to the *Infosex* programs to gauge viewers' reactions. During the program, viewers called in with comments on the shower scene.

After this introduction, Rees conducts the *Infosex* program in a bare studio while sitting several feet above the floor on the top steps of a movable stair unit. Rees is wearing a robe which

he tells the television audience is a gift from his lover. He points out that the robe allows glimpses of his underwear. During a part of the program, Rees holds a toy panda bear. Rees informs his audience that he is homosexual and H.I.V. positive.

While Rees is fielding calls, some callers direct hateful and offensive language toward Rees and his stated lifestyle. One caller carries on a long conversation saying he is homosexual and H.I.V. positive, describing his symptoms and condition; he then ends his call reviling Rees with abusive language. Rees acknowledges that he was fooled by the caller's hoax. In one call, a man claims he is H.I.V. positive and asks about the transmission of the virus and safe-sex techniques. Rees tells him that H.I.V. can be transmitted through oral sex and that you need to make sure you wear a condom. Rees verbally describes a "dental dam," how to make one from a condom, and says that it should be used when performing oral sex on a woman, or "rimming" a man (anilingus). Rees tells the caller, "I don't want you to feel you have to give up your sex life just because you are H.I.V. positive. You will just have to look at sex in a different way."

Rees discusses sexually transmitted diseases and the transmission rates among different population groups. He discusses and disapproves of the "tea room" practice among some gay men. Many of the callers do not talk about Rees' announced theme of the program, sexual fantasies. Some callers' voices sound young, and Rees, apparently perceiving them to be children, cuts them off telling them they should be in bed.

During the second hour of his *Infosex* program, Rees says he is ready to show a film produced by the New York organization, Gay Men's Health Crisis. He says it is primarily for gay men, but he promises that he will in future programs show explicit films for his heterosexual audience. Rees introduces the film:

> Now, there's this little clip that I'm going to show you, and sex is not just limited to, to the bedroom, okay? And, like, we all know in our fantasies, you know, when we fantasize we can probably fantasize about having sex on the beach, or in the car, or outside in your backyard,

> for instance. Um, and of course, if you have a big apartment or a big house, there's the kitchen, there's the living room, there's the dining room, there's the shower, so, um, sex is not just confined to the bathroom or to the -- excuse me -- to the bedroom. So what you want to do, or what you want to see in this tape, is, um, -- it's a little kitchen scene, and, um, not only does the kitchen offer you, like, the countertop or the table, you know, to have sex on, but also the refrigerator, there's lots of goodies that you can use to enhance your sex life. Then again you could take these goodies in a picnic basket and go outside somewhere, um, in a wheat filed, corn field, and lay out a blanket and just have sex out there and, and take out, you know, the marshmallow cream, or, you know, the chocolate sauce, and, you know, rub it around your body and, you know, enjoy licking your partner at the same time while enhancing your taste buds.

The film *Midnight Snack* is then exhibited to the television audience. It shows a kitchen scene with two nude adult males. There is no dialogue. One man is leaning forward resting his upper torso on a table, and the other man engages in anilingus. Following this, the pair embrace kissing each other. The camera then focuses on the pair's erect penises while they masturbate each other. Next, the couple performs fellatio with whipped cream applied to one man's penis and a condom drizzled with honey is placed on the other man's penis. After the showing of *Midnight Snack*, Rees makes a few comments, fields several calls and the program ends.

Appellants argue vigorously that the purpose of the *Infosex* program was to promote safe sexual practices and that *Midnight Snack* was an integral part of the program. Appellants offered extensive expert testimony in support of their theory of the case. Rees stated on the program that abstinence from sex, except in monogamous relationships, was desirable, but unlikely. Therefore, appellants' purported message was that the practice of "safe-sex" is fun and prevents the spread of AIDS.

The Supreme Court has defined obscenity:

> [W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, at 230, 33 L. Ed. 312, quoting *Roth v. United States, supra*, at 489, 1 L. Ed. 2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value test of *Memoirs v. Massachusetts*, 383 U.S., at 419; 16 L. Ed. 2d 1.

Miller v. California, 413 U.S. 15, 24 (1973). While the Supreme Court has not further defined the phrase "work, taken as a whole" used in *Miller*, the Supreme Court and other courts have applied the phrase in various situations, but its application remains uncertain and difficult:

> Although I am in full agreement with Judge Thornberry's analysis of existing precedent relating to application of the "taken as a whole" test to magazines, I write further only to observe that this rule of law in its present state of development creates needless uncertainty for everyone involved.
>
> In its first two tests, Miller (i) adopts a community's standard of prurience and (ii) permits the community to codify specific bans on sexual conduct. An

> over broad interpretation of whether, "taken as a whole," a publication as loosely structured as these magazines lacks serious literary, artistic, political or scientific value could deny all meaning to those standards of morality and decency. How then is this third test to be applied? Should it weigh the good against the bad, i.e., does one brilliant article on the arts outweigh explicit pictures of a couple copulating, or does one series of pictures portraying the rape and mutilation of a child outweigh two average articles on politics or science? When the materials are totally independent of every other portion of the publication except through a claimed appeal to some interest of the magazine's expected audience, I submit that segment ought to be separately appraised. If it is totally independent, it ought not be carried, Typhoid Mary-like, into a community by other articles which shows serious merit. Ipse dixit judicial pronouncements on the value of an individual magazine "as a whole" are no more helpful than the "I know it when I see it" approach. Until the court permits separate appraisal of each discrete segment of the hodge-podge, publishers, community, policeman, and judge will have to continue to wonder what the drum says.

Penthouse International Ltd. v. McAuliffe, 610 F.2d 1353, 1373-74 (5th Cir. 1980) (Clark, Circuit Judge, concurring).

The State argues that the work that is to be taken as a whole should be measured in thematic units. In other words, works or materials that are not related or united by a theme should not be taken as a whole. As one commentator put it:

> The New York courts have followed the approach of evaluating each story or article separately. "If any single item [in a magazine] considered as a whole, were pornographic, the circumstances that it was included in a collection otherwise without taint would not save it from criminal prosecution." But it has also been suggested that, in general, the entire "physical item," that is, book, magazine, or other item, be looked at as a unit. If the "physical item" test were rigidly applied, however, it

> would be far too easy to include hard- core pornography as one article in a magazine also containing excerpts from the writings of D.H. Lawrence or James Joyce.

Frederick F. Schauer, *The Law of Obscenity*, p. 108-9, Bureau of National Affairs, Inc. 1976.

The opinion in *Kois v. Wisconsin*, 408 U.S. 229 (1972) indicates that the work to be taken as a whole should be measured in thematic units and not in physical units. In *Kois*, an underground newspaper carried an article about an obscenity prosecution accompanied by two small pictures of embracing nudes. These pictures were said to be similar to those pictures which were the subject of the prosecution discussed in the article. The court did not decide whether the pictures alone were obscene or whether the newspaper in its entirety must be considered because the article and the pictures were rationally related. The pictures and the accompanying article were taken as a whole because they were thematically related. In *Flying Eagle Publications v. United States*, 285 F.2d 307, 308 (1st Cir.1961), the prosecution was for mailing obscene matter. The defendant complained of the trial court's refusal to instruct the jury that in determining whether an alleged obscene illustration was obscene it must consider the accompanying article taking them as a whole. The court rejected defendant's contention, stating:

> [A] jury is not compelled to regard illustrations as controlled by textual material. An obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details. Nor is the principle different merely because these details might not be readily apparent to everyone upon a casual inspection.

In *United States v. Merrill*, 746 F.2d 458 (9th Cir.1984), the court used a thematic test. The defendant mailed letters which admittedly bore a constitutionally protected message, and attached to the letters were two playing cards depicting adults engaged in oral sex. *Id.* at 464. The government did not attempt to prove that the letters, taken as a whole, lacked serious literary, artistic, political, or scientific value. *Id.* at 464. The court found that the

pornographic playing cards were not a part of the theme and not a part of the message. The attached nonintegrated playing cards could be found to make the whole letter a sham political statement. *Id.* at 464.

In *Goocher v. State*, 633 S.W.2d 860 (Tex. Crim. App. 1982), Judge Clinton used the term "unit of perception," applying a "thematic unit" concept in deciding whether films were obscene. The defendant was prosecuted for exhibiting two allegedly obscene films. The defendant contended that because the deputy sheriff paid a single admission for a program in which three films were shown, the jury should have been required to consider all three films in deciding whether the program as a whole was obscene. The court rejected *Goocher's* contention holding that the State properly exercised its right not to charge *Goocher* with exhibiting the third film in the program.

Infosex was a live, unrehearsed, loosely structured call-in program, a part of which had not yet been created when the film *Midnight Snack* was exhibited. The announced theme of the program was not followed. *Midnight Snack* was a film produced by parties other than appellants long before the program *Infosex* was produced. The *Infosex* video exhibited to the jury was filmed while the program was in progress. Moreover, although the State did not choose to prosecute appellants for the exhibition and promotion of the "shower scene" film shown at the beginning of the *Infosex* program, it, too, may be considered a separate "unit of perception" for which appellants could have been prosecuted. The *Infosex* call-in program was a sham, a pretense, for the promotion of both the "shower scene" film and the *Midnight Snack* film. Despite appellants' argument, we conclude that the *Infosex* program was a vehicle used to promote and exhibit *Midnight Snack*. *Midnight Snack* was a separate unit of perception. *See Merrill*, 746 F.2d at 464; *Goocher*, 633 S.W.2d at 863. As the trial court properly charged the jury, *Midnight Snack* is by itself the "work, taken as a whole." Appellants' fourth point of error is overruled.

In their first two points of error, appellants urge that the State failed to prove that the *Infosex* program was obscene and that

viewed as a whole it lacked serious value. Thereby, arguing that the evidence is insufficient to support their convictions. Because we have decided that appellants could be properly prosecuted for promoting the film *Midnight Snack* alone and apart from the *Infosex* program, the State had no burden to prove the entire program *Infosex* was obscene and as a whole lacked serious value. We will overrule appellants' first two points of error. However, we will discuss appellants' argument as it might apply to the promotion of *Midnight Snack*.

Appellants fault the State for failing to provide expert testimony that the material is obscene. The film of the entire *Infosex* program is in evidence. The film *Midnight Snack* shown on the program is in evidence. This evidence was before the jury and the trial court and it is before this court for our inspection and consideration; therefore, expert testimony is not required. *Hamling v. United States*, 418 U.S. 87, 100, 94 S.Ct. 2887, 2899, 41 L.Ed.2d 590 (1974); *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *Coon v. State*, 871 S.W.2d 284, 289 (Tex.App.--Fort Worth 1994, pet. ref'd). In cases involving hard-core pornography, the trier of fact needs no expert advice. *United States v. Young*, 465 F.2d 1096, 1099 (9th Cir.1972); *United States v. Wild*, 422 F.2d 34 (2d Cir.1969).

Texas statutory provisions are fashioned after the guidelines enunciated in *Miller*. *Coon*, 871 S.W.2d at 287. A person commits an offense if, knowing its content and character, he promotes or possesses with the intent to promote any obscene material. Tex. Penal Code Ann. § 43.23(c). The Texas Penal Code defines obscene:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

Tex. Penal Code Ann. § 43.21 (West 1994).

The jury, properly instructed, found that the material promoted in *Midnight Snack* was obscene. Implicit in the trial court's rulings is an independent finding that the material promoted in *Midnight Snack* is obscene. In determining whether material is constitutionally obscene, appellate courts are obliged to

independently review and evaluate the material. This we have done applying the test of *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). *See also Andrews v. State*, 652 S.W.2d 370, 383 (Tex.Crim.App.1983). We have viewed the entire *Infosex* program, including the film *Midnight Snack*. In our review of the findings of the jury and trial judge, applying *Miller's* test, we find the evidence sufficient to support the jury's verdict and the trial court's finding that *Midnight Snack* is obscene. Applying *Miller's* dictates, we independently find that *Midnight Snack*, taken as a whole, lacks serious literary, artistic, political, or scientific value. Its graphic, explicit depiction of two males engaged in acts of anilingus, fellatio, and mutual masturbation constitutes hard-core pornography that is unprotected by the First Amendment. *See Davis v. State*, 658 S.W.2d 572, 578 (Tex.Crim.App.1983). Appellants' first two points of error are overruled.

In point of error three, appellants assert that the State failed to prove beyond a reasonable doubt that appellants knew the *Infosex* program was obscene. We have held that appellants were properly prosecuted for showing the film *Midnight Snack* by itself; it was unnecessary for the State to prove that the appellants knew the entire *Infosex* program was obscene. We will therefore overrule this point of error. Nevertheless, we will discuss appellants' argument in this point of error as it might apply to the film *Midnight Snack*.

As a matter of law, it is only necessary for the State to prove that appellants knew the content and character of the film. It was as a matter of law unnecessary to allege and prove that appellants knew the film was obscene. Tex. Penal Code Ann. § 43.23 (West 1994). *See Hamling*, 418 U.S. at 120-21, 94 S.Ct. at 2909. However, the State needlessly added to its burden of proof by alleging that appellants not only knew the nature and character of the material, but also that appellants knew the material was obscene. More importantly, the State without objection allowed the trial court to instruct the jury that to find appellants guilty they must find that appellants knew the material was obscene.

Although the record contains evidence that neither appellant believes that *Midnight Snack* is obscene, there is ample evidence in conflict with their stated beliefs for the jury to have found beyond a reasonable doubt that appellants knew *Midnight Snack* was obscene. First, there is evidence that appellants knew the content and character of the film *Midnight Snack* before it was shown on the *Infosex* program. Second, not only is there a presumption that appellants knew the law of obscenity, there is affirmative evidence that appellants knew the law of obscenity.

Johnson's grand jury testimony, which was admitted in evidence, shows appellants previewed *Midnight Snack* and were aware of its content and character before it was shown. Rees' quoted narration immediately before the showing of *Midnight Snack* shows not only an awareness and understanding of the film's nature and character but also a knowledge of the film's prurient nature. Before showing the film, Rees also said, "This one is gay related but you can still learn from it. There's going to be an example of rimming and that is oral contact with the anus." Rees told his television audience and also testified that his "source" of the film *Midnight Snack* was "Rick X." He also testified during direct examination that he thought the film *Midnight Snack* had been shown to other audiences in the United States. On cross-examination Rees testified that someone whom he assumed was "Rick X" filed a lawsuit in New York City in an attempt to force public access television stations to broadcast *Midnight Snack*. A voice heard on the *Midnight Snack* tape preceding the action states that the anilingus scenes,

> did not bother Manhattan cable because there was no masturbation or insertion, so it didn't fit anything on their list. However, the following portion which involves fellatio and masturbation using a condom was basically off limits so they sent this one back, too.

It may be inferred that the New York City stations would not show the film because it was obscene under New York law. Appellants were aware of the controversy in New York City. Immediately following the showing of *Midnight Snack*, Rees, speaking to the viewing audience referred to the film as explicit, and expressed the hope that those persons who had seen the film

could "be mature" about it. Although appellants were not charged with promoting the "shower scene" film, that film was in evidence, and the jury could use that evidence to aid in its determination that appellants had knowledge that *Midnight Snack* was obscene.

Johnson warranted in writing to the cable system that the *Infosex* program did not contain "any material that violates local, state or federal law relating to obscenity" or that was "contrary to local, state, and federal laws." She also acknowledged in writing that she was aware that federal law provides penalties of fines and imprisonment for transmitting obscene matter over any television cable system. To make these statements true, Johnson had to know the law of obscenity. Rees testified that he had seen a documentary film in October 1992, by which he learned the law governing obscenity. Appellants knew that the statute provides that material is obscene which depicts or describes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sodomy, masturbation, lewd exhibition of the genitals or the male genitals in a state of sexual stimulation or arousal. The evidence shows that appellants knew the content and character of the film, *Midnight Snack*, and that they knew the law of obscenity. We conclude that the evidence supports the jury's finding that appellants knew the acts depicted in *Midnight Snack* were obscene beyond a reasonable doubt, and that the State proved the unnecessarily assumed burden that appellants knew *Midnight Snack* was obscene beyond a reasonable doubt. Appellants' third point of error is overruled.

In their fifth point of error, appellants argue that the jury charge improperly failed to instruct the jury that it must find the program lacked serious educational value before it could find it obscene. Appellants say their defense was largely based on their claim that the *Infosex* program and the film *Midnight Snack* had educational value. They maintain the jury instructions left the jury free to conclude that if appellants' program did not rise to the level of "serious science" it could be judged obscene, even if the jury believed the program had serious educational value. Because the appellants' objections to the charge encompassed the entire *Infosex* program and was not limited to *Midnight Snack*, the

objection was too broad and did not preserve the claimed error for review. However, the trial court properly instructed the jury in accord with the statute, Tex. Penal Code Ann. § 43.21, and as required by *Miller v. California*.

In *United States v. One Reel of Film*, 481 F.2d 206, 210 (1st Cir.1973), an argument advanced by the defendant, supported by expert testimony, urged that the film *Deep Throat* had educational value. There the court said:

> The difficulty is that the argument proves too much. We are told by the Supreme Court that obscene material is unprotected by the First Amendment, such material being described as confined to "works which depict or describe sexual conduct." We can only read the recent cases as an express rejection of any argument that pornography itself, because of its liberating impact, has for that reason alone, serious literary, artistic, political or scientific value. We would be misreading the message unmistakably transmitted by the Supreme Court were we to hold otherwise.

Id. at 210. The overall educational value, if any, of exposure to pornography does not create scientific value. Frederick F. Schauer, *The Law of Obscenity*, p. 147, Bureau of National Affairs, 1976. The trial court's charge followed the statute and was sufficient. Appellants' fifth point of error is overruled.

In their sixth point of error, appellants assert the jury charge improperly defined "prurient interest." They argue that the jury should have been told that it could not find appellants guilty if their program appealed only to the intended viewers' healthy interest in sex. The definition of "prurient interest" submitted to the jury reads:

> "Prurient interest" means a shameful, morbid, lascivious, or unhealthy interest in nudity, sex or excretion that goes substantially beyond customary limits of candor in description or representation of sexual conduct. It is marked by restless craving and is easily susceptible to lascivious thoughts or desires.

The Texas statute, like that of most states, does not define "prurient interest." *See* Tex. Penal Code Ann. § 43.21 (West 1994); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505, n. 13, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). It is unnecessary to define "prurient interest" in the court's jury charge. *Andrews v. State*, 652 S.W.2d 370, 376-77 (Tex.Crim.App.1983); *Ho v. State*, 856 S.W.2d 495, 500 (Tex.App.--Houston [1st Dist.] 1993, no pet.). When the charge submitted is a correct statement of the law, there is no harm in refusing another requested charge. *Bell v. State*, 582 S.W.2d 800 (Tex.Crim.App.1979); *Philen v. State*, 683 S.W.2d 440, 445 (Tex.Crim.App.1984). The charge given defined prurient interest as an "unhealthy interest in nudity, sex, or excretion." Logically, a healthy interest in sex is non-prurient. *See Ho*, 856 S.W.2d at 500. The trial court did not err in refusing the requested charge. Appellants' sixth point of error is overruled.

The judgments are affirmed.

S/Carl E. F. Dally

Carl E. F. Dally, Justice

Before Justices Powers, Aboussie and Dally*
Affirmed on Both Causes
Filed: October 18, 1995
Publish

*Before Carl E. F. Dally, Judge (retired), Court of Criminal Appeals, sitting by assignment. *See* Tex. Gov't Code Ann. § 74.003(b) (West 1988).

(Postmark: Nov. 15, 1995)

OFFICIAL NOTICE FROM COURT OF APPEALS
THIRD DISTRICT OF TEXAS

DATE: November 15, 1995
RE: Case No. 03-94-00290-CR
STYLE: Gareth Rees vs. The State of Texas

The appellant's consolidated motion for rehearing and suggestion for en banc reconsideration was overruled by this Court on the date noted above.

T.C. Case # 400,780 W. Kenneth Law, Clerk
THIRD COURT OF APPEALS
P.O. BOX 12547
AUSTIN, TEXAS 78711

MAIL TO: Mr Peter D. Kennedy
George Donaldson & Ford L L P
114 West 7th Street - Suite 1000
Austin, TX 78701

(Postmark: Nov. 15, 1995)

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DATE: November 15, 1995
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George Donaldson & Ford L L P
114 W. 7th Street - Suite 1000
Austin, TX 78701

OFFICIAL NOTICE **(Postmark: Feb 28, 1996)**
COURT OF CRIMINAL APPEALS
February 28, 1996
COA# 02-94-00290-CR
RE: Case No. 0002-96
STYLE: Rees, Gareth

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE CLINTON WOULD GRANT.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: PETER D KENNEDY
114 W. 7TH STREET
SUITE 1000
AUSTIN, TX 78701

OFFICIAL NOTICE **(Postmark: Feb 28, 1996)**
COURT OF CRIMINAL APPEALS
February 28, 1996
COA# 02-94-00291-CR
RE: Case No. 0003-96
STYLE: Johnson, Terrell Denise

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

JUDGE CLINTON WOULD GRANT.

Troy C. Bennett, Jr., Clerk

COURT OF CRIMINAL APPEALS
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AUSTIN, TEXAS 78711

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AUSTIN, TX 78701

NO. 400,780

THE STATE OF TEXAS	*	IN THE COUNTY COURT
	*	
VS.	*	AT LAW NO. SEVEN
	*	
GARETH REES	*	TRAVIS COUNTY, TEXAS

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, Gareth Rees, stands charged by indictment with the offense of promotion of obscenity, alleged to have been committed in Travis County, Texas, on or about August 23, 1993. To this Charge the Defendant has plead "Not Guilty." You are instructed that the law applicable to this case is as follows;

I.

A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

II.

"Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or

simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

"Person" means an individual or a corporation.

"Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

"Prurient Interest" means a shamefully morbid, lascivious, or unhealthy interest in nudity, sex or excretion that goes substantially beyond customary limits of candor in description or representation of the sexual conduct. It is marked by restless craving and is easily susceptible to lascivious thoughts or desires.

"Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

"Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

"Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

"Patently offensive" means so offensive on its face as to affront current community standards of decency.

"Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

III.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding this conduct when he is aware of the nature of his conduct or the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the results.

IV.

In deciding whether the material as a whole appeals to the prurient interest and whether the sexual conduct is portrayed in a patently offensive way, the jury must avoid subjective personal opinion and act as a private adult person applying the collective view of the adult community as a whole.

You are further instructed that in determining the contemporary community standards, you may consider any evidence presented during the trial of this case of community standards over the entire State of Texas and rely on your own knowledge of the views and sense of the average person in arriving at your determination of contemporary community standards.

"Contemporary community standards" means the standard generally held throughout the State of Texas concerning sex and matters pertaining to sex. The phrase means the average conscience of the time and the present critical point in the compromise between candor and shame at which the community have arrived here and now.

You are the sole judges of the contemporary community standards of the State of Texas. In arriving at and applying your judgment, however, you are not to consider your own standards of what is good and bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards if you know and believe them to be more tolerant than those that are generally held.

In determining and applying the contemporary community standards of the State of Texas, you are to call upon everything that you have learned during the trial of this case and everything that you have learned, seen, read and observed in your own experience concerning the standards and values that are generally held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned and observed from and about people residing in your present locality. Rather, you are to take into consideration what you learned or observed if you have lived or traveled throughout the State of Texas, and what you have learned and observed from people any place in the State of Texas whom you have met in business, at school, while you were in the armed services, or while you or they were traveling, and what you have learned from what you may have read during your lifetime.

You may very well determine that standards are no different in this locality and area than they are in any other part of the State of Texas. But if you find standards here to be stricter than they are more generally throughout the State, you are not to condemn by local standards, and if you find standards here to be more tolerant than they are more generally throughout the State, you are not to exculpate or excuse by local standards. On the other hand, you are not to judge community standards by one area that you know of where standards may either be stricter or more tolerant than they are either here or generally.

V.

In determining whether or not the material, if any, at issue is obscene, the jury must first determine whether or not the content of the material affronts contemporary community standards

of decency to the point of being patently offensive to the average person in the community. Next, after examining the whole of the material, you must determine whether or not the average person applying contemporary community standards would find the material appeals to a prurient interest in sex as previously defined. And finally, the jury must determine whether or not a reasonable person would find the material, taken as a whole, lacks serious literary, artistic, political and scientific value. If these three tests for the determination of whether or not the material, if any, at issue is obscene are present in the material beyond a reasonable doubt, then you may find the material, if any, to be obscene; otherwise, if any one of these three tests has not been proven to you beyond a reasonable doubt, the material, if any, is not obscene under our law.

VI.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of August, 1993, in Travis County, Texas, the defendant, Gareth Rees, did then and there knowing the content and character of certain material was obscene, to wit: one (1) video tape depicting a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man licking with his tongue the anus of another and the two men masturbating each other, did then and there promote said material by transmitting, exhibiting, disseminating and presenting said video tape during a broadcast on Austin Cablevision channel, or that, Gareth Rees, did then and there knowing the content and character of a certain performance was obscene, to wit: one (1) video tape depicting a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man licking with his tongue the anus of another and two men masturbating each other, did then and there produce, present and direct said performance, then you will find the Defendant guilty as charged.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

VII.

In all criminal cases, the burden of proof is on the State. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt. The fact that a defendant has been arrested, confined, or otherwise charged with, the offense gives rise to no inference of guilt at this trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him/her and say by your verdict "Not guilty."

VIII.

It is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he may have heard regarding the case or any witness therein, from any source other than the witness stand.

IX.

In deliberating you are not to refer to or discuss any matter or issue not in evidence before you; not talk about this case to anyone not of your jury.

You are the exclusive judges of the facts proven, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the Court, which is herein given you, and to be governed thereby.

X.

After arguments of counsel, you will retire and select one of your members as your foreperson. It is his or her duty to preside at your deliberations and to vote with you in arriving at a verdict. Your verdict must be unanimous, and after you have arrived at your verdict, you may use one of the forms attached hereto by having your foreperson sign his or her name to the particular form that conforms to your verdict.

After you have retired, you may communicate with this Court in writing through the officer, the court bailiff, who has you in charge. Do not attempt to talk to the bailiff, the attorneys, the court, nor anyone else concerning any question you may have.

A suitable form for your verdict is hereto attached. Your verdict must be in writing and signed by your foreperson. Your sole duty at this time is to determine whether the defendant is guilty or not guilty under the information in this cause, and restrict your deliberation solely to that question.

S/Brenda Kennedy

Brenda Kennedy, Judge
County Court at Law No. 7
Travis County, Texas

4-8-94 5:51 p.m.

Date/Time

NO. 400,781

THE STATE OF TEXAS	*	IN THE COUNTY COURT
	*	
VS.	*	AT LAW NO. SEVEN
	*	
TERREL JOHNSON	*	TRAVIS COUNTY, TEXAS

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, Terrel Johnson, stands charged by indictment with the offense of promotion of obscenity, alleged to have been committed in Travis County, Texas, on or about August 23, 1993. To this Charge the Defendant has plead "Not Guilty." You are instructed that the law applicable to this case is as follows;

I.

A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

II.

"Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

"Person" means an individual or a corporation.

"Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

"Prurient Interest" means a shamefully morbid, lascivious, or unhealthy interest in nudity, sex or excretion that goes substantially beyond customary limits of candor in description or representation of the sexual conduct. It is marked by restless craving and is easily susceptible to lascivious thoughts or desires.

"Deviate sexual intercourse" means any contact between the genitals of one person and the mouth or anus of another person.

"Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

"Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

"Patently offensive" means so offensive on its face as to affront current community standards of decency.

"Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

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A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding this conduct when he is aware of the nature of his conduct or the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the results.

IV.

In deciding whether the material as a whole appeals to the prurient interest and whether the sexual conduct is portrayed in a patently offensive way, the jury must avoid subjective personal opinion and act as a private adult person applying the collective view of the adult community as a whole.

You are further instructed that in determining the contemporary community standards, you may consider any evidence presented during the trial of this case of community standards over the entire State of Texas and rely on your own knowledge of the views and sense of the average person in arriving at your determination of contemporary community standards.

"Contemporary community standards" means the standard generally held throughout the State of Texas concerning sex and matters pertaining to sex. The phrase means the average conscience of the time and the present critical point in the compromise between candor and shame at which the community have arrived here and now.

You are the sole judges of the contemporary community standards of the State of Texas. In arriving at and applying your judgment, however, you are not to consider your own standards of what is good and bad. You are not to condemn by your own standards, if you know and believe them to be stricter than those generally held, and you are not to exculpate or excuse by your own standards if you know and believe them to be more tolerant than those that are generally held.

In determining and applying the contemporary community standards of the State of Texas, you are to call upon everything that you have learned during the trial of this case and everything that you have learned, seen, read and observed in your own experience concerning the standards and values that are generally held. You are not to limit yourself to what you have learned while residing in your present locality or what you have learned and observed from and about people residing in your present locality. Rather, you are to take into consideration what you learned or observed if you have lived or traveled throughout the State of Texas, and what you have learned and observed from people any place in the State of Texas whom you have met in business, at school, while you were in the armed services, or while you or they were traveling, and what you have learned from what you may have read during your lifetime.

You may very well determine that standards are no different in this locality and area than they are in any other part of the State of Texas. But if you find standards here to be stricter than they are more generally throughout the State, you are not to condemn by local standards, and if you find standards here to be more tolerant than they are more generally throughout the State, you are not to exculpate or excuse by local standards. On the other hand, you are not to judge community standards by one area that you know of where standards may either be stricter or more tolerant than they are either here or generally.

V.

In determining whether or not the material, if any, at issue is obscene, the jury must first determine whether or not the content of the material affronts contemporary community standards

of decency to the point of being patently offensive to the average person in the community. Next, after examining the whole of the material, you must determine whether or not the average person applying contemporary community standards would find the material appeals to a prurient interest in sex as previously defined. And finally, the jury must determine whether or not a reasonable person would find the material, taken as a whole, lacks serious literary, artistic, political and scientific value. If these three tests for the determination of whether or not the material, if any, at issue is obscene are present in the material beyond a reasonable doubt, then you may find the material, if any, to be obscene; otherwise, if any one of these three tests has not been proven to you beyond a reasonable doubt, the material, if any, is not obscene under our law.

VI.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 23rd day of August, 1993, in Travis County, Texas, the defendant, Gareth Rees, did then and there knowing the content and character of certain material was obscene, to wit: one (1) video tape depicting a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man licking with his tongue the anus of another and the two men masturbating each other, did then and there promote said material by transmitting, exhibiting, disseminating and presenting said video tape during a broadcast on Austin Cablevision channel, or that, Terrel Johnson, did then and there knowing the content and character of a certain performance was obscene, to wit: one (1) video tape depicting a man with the penis of another man in his mouth, a man placing his finger in the anus of another, a man licking with his tongue the anus of another and two men masturbating each other, did then and there produce, present and direct said performance, then you will find the Defendant guilty as charged.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

VII.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

VIII.

In all criminal cases, the burden of proof is on the State. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt. The fact that a defendant has been arrested, confined, or otherwise charged with, the offense gives rise to no inference of guilt at this trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him/her and say by your verdict "Not guilty."

IX.

It is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he may have heard regarding the case or any witness therein, from any source other than the witness stand.

X.

In deliberating you are not to refer to or discuss any matter or issue not in evidence before you; not talk about this case to anyone not of your jury.

You are the exclusive judges of the facts proven, of the credibility of the witnesses and of the weight to be given to their testimony, but you are bound to receive the law from the Court, which is herein given you, and to be governed thereby.

XI.

After arguments of counsel, you will retire and select one of your members as your foreperson. It is his or her duty to preside at your deliberations and to vote with you in arriving at a verdict. Your verdict must be unanimous, and after you have arrived at your verdict, you may use one of the forms attached hereto by having your foreperson sign his or her name to the particular form that conforms to your verdict.

After you have retired, you may communicate with this Court in writing through the officer, the court bailiff, who has you in charge. Do not attempt to talk to the bailiff, the attorneys, the court, nor anyone else concerning any question you may have.

A suitable form for your verdict is hereto attached. Your verdict must be in writing and signed by your foreperson. Your sole duty at this time is to determine whether the defendant is guilty or not guilty under the information in this cause, and restrict your deliberation solely to that question.

S/Brenda Kennedy

Brenda Kennedy, Judge
County Court at Law No. 7
Travis County, Texas

4-8-94 5:51 p.m.

Date/Time

DEFENDANTS' PROPOSED JURY INSTRUCTION 3

You are instructed that the term "scientific" includes educational.

GIVEN_____ REFUSED __✓BK__

S/Brenda Kennedy

Brenda Kennedy, Judge
County Court at Law No. 7
Travis County, Texas

4/8/94

Date

7:30 PM 4-8-94

ARE WE DIRECTED TO CONSIDER THE TWO HOUR TAPE AS A WHOLE, OR ARE WE ALLOWED TO CONSIDER ONLY THE CLIP?

Jack Lemmon

~~In the Alternative~~

Everything that you can consider is contained in the court's charge(s). You must read it thoroughly and in its entirety. I can comment no further

FILED
1994 APR 11 PM 1:55
DANA DE BEAUVOIR
COUNTY CLERK
HAYS COUNTY, TEXAS

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

No. 96-37

In The

Supreme Court of the United States

October Term, 1995

GARETH REES and TERREL JOHNSON,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Third District Court Of Appeals Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

KEN ODEN
Travis County Attorney
Counsel of Record

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Attorneys for Respondent

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QUESTIONS PRESENTED

1. Does the First Amendment permit an obscenity prosecution based solely on Petitioners' promoting the film *Midnight Snack*, which they exhibited in the course of a local two-hour television broadcast?

2. Does the *Miller v. California* obscenity test's "serious value" prong include "serious educational value?"

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINION BELOW 1
JURISDICTION 1
STATEMENT OF THE CASE 1
STATUTES INVOLVED IN THE CASE 1
REASONS FOR DENYING THE WRIT 4
CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Coon v. State, 871 S.W.2d 284 (Tex. App. – Fort Worth 1994, pet. ref'd) 5

Flying Eagle Publications v. United States, 285 F.2d 307 (1st Cir. 1961) 10

Grayson v. Harris, 267 U.S. 352 (1925) 11

Heath v. Alabama, 474 U.S. 82 (1985) 9

Illinois v. Gates, 462 U.S. 213 (1983) 8

Kois v. Wisconsin, 408 U.S. 229 (1972) 8, 9, 10

Memoirs v. Massachusetts, 383 U.S. 413 (1966) 5

Miller v. California, 413 U.S. 15 (1973) 4, 5, 6, 7

Penthouse International, Ltd. v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980) 10

Rees et al. v. State, 909 S.W.2d 264 (Tex. App. – Austin 1995, pet. ref'd) 1

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 9

United States v. Merrill, 746 F.2d 458 (9th Cir. 1984) 11

Vachon v. New Hampshire, 414 U.S. 478 (1974) 9

Zucht v. King, 260 U.S. 174 (1922) 5

STATUTES AND RULES:

28 U.S.C. §1257(a) 1, 4, 5, 6, 8

Supreme Court Rule 10 9

TEX. PENAL CODE §43.21 .....2, 3

TEX. PENAL CODE §43.23 3

TABLE OF AUTHORITIES – Continued

Page

TEX. PENAL CODE §43.24 6

WIS. STAT. §944.21(2)(c)(3) 5

OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (Pet. App. A-1), is reported at 909 S.W.2d 264. The denial of rehearing by the Court of Appeals (Pet. App. A-17) and the refusal of review by the Texas Court of Criminal Appeals (Pet. App. A-18) were without opinion.

JURISDICTION

This Court lacks jurisdiction under 28 U.S.C. §1257(a) because Petitioners' questions are not substantial and were neither pressed nor passed upon below.

STATEMENT OF THE CASE

Petitioners fail to accurately present the facts essential to a ready and adequate understanding of their points. The State of Texas hereby incorporates by reference the detailed and accurate factual background of this case included in the opinion of the Third Court of Appeals. See opinion below, 909 S.W.2d at 266-67. (Pet. App. A-1 through A-5).

STATUTES INVOLVED IN THE CASE

In addition to the federal constitutional provision Petitioners cite, this case also involves the following state statutory provisions:

Texas Penal Code §43.21. Definitions

(a) In this subchapter:

(1) "Obscene" means material or a performance that:

(A) the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;

(B) depicts or describes:

(i) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or

(ii) patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, lewd exhibition of the genitals, the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation of the human genital organs; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) "Material" means anything tangible that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound, or in any other manner, but does not include an actual three dimensional obscene device.

(3) "Performance" means a play, motion picture, dance, or other exhibition performed before an audience.

(4) "Patently offensive" means so offensive on its face as to affront current community standards of decency.

(5) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

. . .

Texas Penal Code §43.23. Obscenity

. . .

(c) A person commits an offense if, knowing its content and character, he:

(1) promotes or possesses with intent to promote any obscene material or obscene device; or

(2) produces, presents, or directs an obscene performance or participates in a portion thereof that is obscene or that contributes to its obscenity.

(d) An offense under Subsection (c) is a Class A misdemeanor.

TEX. PENAL CODE ANN. §§43.21, 43.23 (West 1994).

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction to review Petitioners' questions under 28 U.S.C. §1257(a).

The basis of these promotion of obscenity prosecutions was a film entitled *Midnight Snack*, which Petitioners exhibited in the course of one of the *Infosex* television programs. *Infosex* was a regularly scheduled, live broadcast with a call-in format, produced by Petitioner Johnson and hosted by Petitioner Rees. A detailed description of the entire *Infosex* program on the night in question, including *Midnight Snack*, is set out in the Third Court of Appeals' opinion. (Pet. App. A-3 through A-5).

Petitioners first ask whether, in the case of composite materials, the medium of promotion makes a difference in determining what is the material to be taken as a whole. Second, they ask whether the *Miller v. California*, 413 U.S. 15 (1973), "serious literary, artistic, political or scientific" list is exclusive, or whether this list may not also include an "educational" value. They contend the entire *Infosex* program was educational and therefore must have been considered as a whole. Hence, their two questions are logically related in that the first "taken as a whole" question is not reached unless the Court answers Petitioners' second question in the affirmative and includes "serious educational value" in the list of *Miller* redeeming values.

A. Neither of the two constitutional questions presented is substantial in character.

Not every constitutional issue "drawn in question" presents a federal question vesting the Supreme Court with jurisdiction under §1257(a). Rather, the "drawn in question" language of §1257(a) requires that a **substantial** federal question be presented before the Supreme Court's jurisdiction is created. The substantiality requirement is defeated when a decision or decisions of this Court have so explicitly foreclosed the question as to leave no room for real controversy. *Zucht v. King*, 260 U.S. 174, 176 (1922).

Petitioners' second "educational" question is not substantial in character because, under *Miller*, a state law that regulates obscene materials according to the *Miller* guidelines adequately protects First Amendment values. *Miller v. California*, 413 U.S. at 25. The Texas promotion of obscenity statute defines obscenity according to the *Miller* guidelines. *Coon v. State*, 871 S.W.2d 284 (Tex. App. – Fort Worth 1994, pet. ref'd). The *Miller v. California* decision has therefore so explicitly foreclosed Petitioners' second question as to leave no room for real controversy before this Court.

Petitioners' recourse lies with the Texas Legislature, which is free to provide more protections to its citizens under state law and add "educational" to the list of terms provided in *Miller*, just as the Wisconsin Legislature did. *See*, WIS. STAT. §944.21(2)(c)(3). Indeed, the Texas Legislature has seen fit to retain the heightened *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), "utterly without redeeming social value" standard in defining "harmful

materials" under the display of harmful materials to minors statute. TEX. PENAL CODE §43.24 (West 1994). The jury acquitted Petitioners of these charges.

This Court's *Miller* decision forecloses Petitioners' second question. Logic forecloses the first. As noted earlier, whether Petitioners' first "taken as a whole" question is reached depends on this Court's first finding for them on the second "educational" question. Since this Court lacks jurisdiction under §1257(a) to review Petitioners' second question, the first question cannot be reached, and the Court therefore must also lack jurisdiction to review it.

B. Petitioners' questions were not pressed or passed upon below.

The Third Court of Appeals was not asked to decide and did not decide whether the *Miller* list of redeeming values is "talismanic and exclusive," or whether "educational" might not also figure as a fifth adjective in that list. Rather, the issue appealed was whether the trial court had erred in refusing their requested jury instruction that "scientific **includes** educational." (Pet. App. A-35). The Third Court found that question to have been waived, because Petitioners' requested instruction encompassed the entire *Infosex* program and was not

limited to *Midnight Snack*. (Pet. App. A-14, A-15).[1] Having determined that *Midnight Snack* was properly the subject of the jury's deliberations, the Third Court went on to discuss the point only as it pertained to *Midnight Snack*, holding that the trial court had properly instructed the jury in accordance with the relevant state statute. (Pet. App. A-15).

The second question Petitioners now present, whether "educational" is a redeeming value in its own right under *Miller*, or whether, instead, the *Miller* list is "talismanic and exclusive," was first raised in their petition for discretionary review to the Texas Court of Criminal Appeals. That Court denied review without opinion.

Underscoring Petitioners' failure to present their second question is their failure to specifically define "education" at any point in proceedings to date. They concede that the average person applying contemporary community standards would find that *Midnight Snack*, taken as a whole, is patently offensive and appeals to the prurient interest in sex. Nevertheless, juxtaposing *Midnight Snack* against "old Army scare VD films," they contend that promoting material the likes of *Midnight Snack* is the only way to make safer sex techniques "attractive and stimulating" to gay men. As the Third Court of Appeals noted, the overall educational value, if any, of exposure to pornography does not create scientific value. (Pet. App. A-15).

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[1] Petitioners' fifth point of error to the Third Court of Appeals alleged that "[t]he jury charge improperly failed to instruct the jury that it must find **the program** lacked serious educational value to find it obscene."

Moreover, the Third Court of Appeals was not asked to decide and did not decide whether the medium involved in this case dictated a different analysis of the "taken as a whole" issue under *Kois v. Wisconsin*, 408 U.S. 229 (1972). Petitioners mentioned only in passing, on page 11 of their original brief to the Third Court of Appeals, that the medium of promotion was irrelevant in deciding what was the material to be taken as a whole. Whether the medium dictated a different analysis was not urged at all in the petition for discretionary review to the Texas Court of Criminal Appeals.

Generally, the Supreme Court lacks certiorari jurisdiction over a state court decision under 28 U.S.C. §1257(a) unless the federal question was both raised and decided in the state courts below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983). This has come to be known as the "not pressed or passed upon below" rule. *Id.* at 219. The *Gates* petitioners asked this Court to review whether the federal exclusionary rule should be modified. The Court decided it did not have jurisdiction to decide the modification question; while the Illinois state courts had applied the exclusionary rule, the issue of modifying it had been neither pressed nor passed upon below. *Id.* at 222-23.

As in *Gates*, this case does not present the requisite "real contest" below on the two specific questions Petitioners now ask. *Illinois v. Gates*, 462 U.S. at 223. To permit them to raise new questions for the first time to this Court undermines the reasons for the "not pressed or passed upon below" rule. Due regard for the appropriate relationship of this Court to state courts dictates that the lower courts be given the opportunity to consider and decide their own state statutes. *Illinois v. Gates*, 462 U.S. at

219, 221-22. Moreover, to allow Petitioners to argue questions other than those presented below is to ask this Court to exercise scarce judicial resources without the benefit of the lower courts' refinement and resolution of those issues. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).

While the more accepted rule is that §1257 and its predecessors are jurisdictional rules demanding questions be raised and decided in the lower courts before this Court's jurisdiction is created, some Supreme Court decisions have treated the "not pressed or passed upon below" rule as prudential. *E.g., Vachon v. New Hampshire*, 414 U.S. 478 (1974). However, even if the Court were not jurisdictionally barred from claims not pressed or passed upon in the state courts, "the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

II. There are no compelling reasons to grant the Writ.

There are no "compelling reasons" to grant the Writ, as required by Supreme Court Rule 10.

A. The court below fully considered and correctly decided the "taken as a whole" issue in accordance with the decisions of this Court and relevant state statutory provisions.

In an attempt to create a conflict between the opinion below and this Court's opinion in *Kois v. Wisconsin*, 408 U.S. 229 (1972), Petitioners speculate the Third Court of

Appeals applied a physical unit test because the physical media involved here differed from the printed newspaper publication in *Kois*.

The Third Court of Appeals' opinion clearly shows that, in its independent review, it fully considered the entire *Infosex* program and decided the "taken as a whole" issue in accordance with the *Kois* thematic unit analysis and the Texas statutory definitions of "material" and "promote." (Pet. App. A-6 through A-9). Carefully and conscientiously detailing its reasons for doing so, the Third Court held that "[t]he *Infosex* call-in program was a sham, a pretense, for the promotion of both the 'shower scene' film and the *Midnight Snack* film." (Pet. App. A-9).

B. Lower courts are not in conflict or in need of guidance on the "taken as a whole" issue.

Petitioners assert the lower courts are in need of guidance because *Kois* has created a rule of law that results in "needless uncertainty," which has "only been exacerbated by developing technology." This assertion is based upon a portion of a Fifth Circuit concurring opinion, quoted in the Third Court's opinion. *Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1373-74 (5th Cir. 1980) (Clark, Circuit Judge, concurring). (Pet. App. A-7).

Lower courts are not in conflict or in need of guidance on this issue, and the excerpt from the Fifth Circuit concurring opinion in *Penthouse* is not a compelling reason to grant the Writ. Lower courts consistently apply a thematic unit test in the case of composite materials. *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir 1980); *Flying Eagle Publications v. United States*,

285 F.2d 307 (1st Cir. 1961); *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984). That the analysis may be less straightforward in the case of some composite materials merely indicates that some questions are factually more complex than others. It does not render the legal landscape uncertain, as Petitioners contend.

C. Petitioners are asking this Court to exert its jurisdiction to reconsider factual findings.

Although the evidence persuaded both the trial court and the Third Court of Appeals otherwise, to Petitioners "[i]t seems indisputable that the short video in this case was 'rationally related' to the two-hour program." This assertion underscores their wish to relitigate the lower courts' factual findings as to their intent and as to the relatedness of the materials they promoted. Generally, however, the Supreme Court will not exert its jurisdiction merely to reexamine a state court's findings and conclusions of fact. *Grayson v. Harris*, 267 U.S. 352, 358 (1925).

No compelling reason exists in this case for the Court to depart from its longstanding policy.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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